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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 29 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereJJJJJJJJJJJJJJJJJJJJJJJJJJJJJ

5. Whether it is to be circulated to the Civil Judge? To be Circulated in Magistrate Criminal Court & Sessions Court.

HARSUKHBHAI LAKSHMANBHAI

Versus

STATE OF GUJARAT

Appearance:

MR KJ KAKKAD for Petitioner

MR AJ DESAI, APP for Respondent No. 1

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 17/03/2001

C.A.V. JUDGEMENT

1. Harsukhbhai Lakshmanbhai, petitioner-original accused No.2 has filed this Criminal Revision Application under Sec.397 of the Code of Criminal Procedure Code, 1973 (hereinafter referred to as `the Code'). The petitioner has challenged the order dated 19th December, 2000, passed by the learned JMFC, Mansa, wherein the

learned Magistrate was pleased to reject the application Exh.97 in Criminal Case No.392/95, 428/95 and 43/96. The learned Magistrate rejected the said application of the accused wherein the accused has stated that he is not the drawer of the cheque as per the averments of the complaints and he may kindly be ordered to be acquitted of the charge of the offence alleged in the complaint.

2. The facts giving rise to this application are as under:

2.1 That one Gandalal Revabhai Chowdhary-respondent No.2 filed a Criminal Case Nos.392/95, 428/95 and 43/96 against petitioner accused before the Court of learned JMFC, Mansa. In that case, offences punishable under Secs.138, 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as `the Act') were alleged against the petitioner-accused. In that case as the facts set out in the complaint by the complainant it has been stated that the respondent No.2-complainant is carrying on business of commission. The complainant is a partner of the firm Dhanlaxmi Corporation. In the complaint, it has been stated that there is a firm M/s. Bhagyoday Industries who is accused No.3 and firm is having a Oil Mill. Accused No.1 and 2 are partners of the said firm.

2.2 It has been alleged that the business of sale and purchase between complainant and accused No.3 were going on. In that business accused No.3 has to pay Rs.16,88,153/against the goods purchased by firm from the complainant. Out of that amount accused No.3 has paid Rs.10,95,000/-. Thereafter accused No.3 had presented following three cheques:

	Date	Cheque	Bank Name	Amount
1.	15.6.95	858683	State Bank of India	Rs.1,00,000/-
2.	30.6.95	858684	" "	Rs.4,00,000/-
3.	15.7.95	858685	" "	Rs.1,02,855/-

2.3 When the said cheques were issued in the name of partnership firm accused No.1 has signed on behalf of accused No.3 and accused No.2 assured that the said amount will be paid by the firm in this behalf.

2.4 From the record and the complaint it appears that on 30th June, 1995, when the cheques were presented of Rs.4.00 lakhs the same was dishonoured. Thereafter a notice was addressed on 10th July, 1995, as well as 25th

July, 1995, to the accused though earlier notice was not served but the second notice dated 25th July, 1995, was served to the accused. As about Rs.6,02,852/- amounts due and payable were not paid, the complainant has filed present complaint on 2.9.95 before the learned Magistrate, Mansa, being Criminal Case No.428/95. In that case also the complainant has filed affidavit and the learned Magistrate passed the order on 2.9.95 of issuing summons.

2.5 In that case, original accused No.2 has filed application dated 14th August, 2000, and prayed that as accused No.2 who is admittedly not drawer of the cheque and as per the averments of the complaints may kindly be ordered to be acquitted of the charge of the offence alleged in the interest of justice. That matter was heard by learned Magistrate, Mansa. The learned Magistrate after considering the provisions of Secs.138, 141 of the Act, copy of the complaint and also considered some of the judgments cited by the petitioner accused had rejected the said application on 19.12.2000.

2.6 Being aggrieved and dissatisfied with the aforesaid order of the learned Magistrate, the petitioner-original accused No.2 has filed this revision application before this Court somewhere on 10th January, 2001. On 23rd January, 2001, this Court has admitted the matter and made returnable on 6.2.2001.

3. In view of the aforesaid proceedings the matter has been taken up for final hearing.

The petitioner's counsel contention challenging order of learned Magistrate dated 2.9.95 issuing summons.

4. Mr.Kakkad, learned advocate for the petitioner submitted that, in this case, originally complaint was filed on 2nd September, 1995. Alongwith the complaint an affidavit was also filed and ultimately on 2nd September, 1995, the learned Magistrate has issued summons in view of Secs.138, 141 of the Act. He submitted that the learned Magistrate ought not to have issued summons in this behalf, and that the order of the learned Magistrate issuing summons is contrary to and inconsistent with the provisions of the Code particularly Sec.200 of the Code which provides examination of complainant alongwith Sec.201 of the Code which provides for procedure by Magistrate not competent to take cognizance of the case and Sec.202 of the Code which provides for postponement of issue of process.

4.1 In support of his contention, he has relied upon judgment of the Hon'ble Apex Court in the case of K.M.Mathew Vs. State of Kerala and another reported in AIR 1992 S.C. 2206. In para 8 the Hon'ble Supreme Court has held as under:

> "It is open to the accused to plead before the Magistrate that the process against him ought not to have been issued. The Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision is required for the Magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused."

4.2 Learned counsel for the petitioner has relied upon the judgment of the Hon'ble Apex Court in the case of Sushil Kumar Sen Vs. State of Bihar reported in AIR 1975 SC 1185. Relying upon para 6 of the said judgment he submitted that merely because the accused has not raised this contention at the earlier stage and also at the subsequent stage and only raised at the fag end it cannot be defeated only on the ground of delay because according to him the processual law should not dominates and should not defeat substantive rights and substantial justice in this behalf.

4.3 On the other hand, Shri A.J.Desai, learned APP for the respondent has taken me to the entire complaint. From the averments of the complaint he submitted that the complaint prima facie discloses the offence against all the accused including accused No.2. The learned APP has tried to support the reasonings of the learned Magistrate in his order dtd.19.12.2000. The learned APP further submitted that, in this case, the complaint was filed on 2nd September, 1995, and in support of the complaint, an affidavit was also filed and thereafter the learned Magistrate was satisfied and ultimately issued summons by his order dtd.2.9.95 as per Secs.138 and 141 of the Act. He has further submitted that after the issuance of the said summons, petitioner-accused No.2 has filed application for acquitting him only on 14th August, 2000, before that the accused has not raised any contention in this behalf. He has also further submitted that when the

learned Magistrate passed impugned order dated 19.12.2000 also the accused has not raised the contention in this behalf. He has further submitted that even the revision application filed on 10.1.2001 in para 6(a) the petitioner-accused No.2 has challenged the only order dated 19.12.2000 passed below at Exh.97 and he has not challenged the earlier order dated 22.9.95. In view of the same, he submitted that in any view of the matter the learned advocate for the petitioner cannot challenge the order dated 2.9.95, in view of this facts and circumstances of the case only at the fag end of final hearing the learned advocate for the petitioner-accused No.2 cannot raise such contention in this behalf.

4.3(A) In my view, there is no substance in the contention of the petitioner. In this case complaint was filed in 1995, affidavit was also filed in 1995, the learned Magistrate after satisfying himself and after going through record of the case issued summons under the provisions of the Code in 1995. In my view the learned Magistrate has rightly exercised jurisdiction of issuing summons after going through the record of the case. So even on merits also order of the learned Magistrate is legal and valid. In view of the same, the first contention raised by the learned advocate for the petitioner is rejected.

Contention Regarding Sec.138 and Sec.141 of Negotiable Instruments Act:
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5. Before I consider the rival submission on merits of the matter, let me refer the statutory provisions. Sec.138 of the Negotiable Instruments Act provides dishonour of cheque for insufficiency, etc., of funds in the account is falling under Chapter 17 of the Act. The title of the said Chapter is as follows:

"Chapter 17 :- Of penalties in case of dishonour of certain cheques for insufficiency in the accounts."

Sec.138 of the Act reads as under:

"Sec.138 Dishonour of cheque for insufficiency, etc., of funds in the account:- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank

unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both :

Provided that nothing contained in this section shall apply unless -

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice."

Sec.141 of the Act reads as under:

"Offences by companies:-

(1) If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this

sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

6. The learned APP has also relied upon Chapter 3 of the Indian Partnership Act which provides relations of partners to third parties. He has also relied upon Sec.18 of the Partnership Act which provides partner to be agent of the firm subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm.

Sec.19(1) which defines implied authority, is subject to the provisions of Sec.22.

Sec.22 which provides mode of doing act to bind firm :-

In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm."

Sec.25 which provides for liability of a partner for acts of the firm:-

Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a partner.

7. The learned counsel for petitioner has submitted on merits of the matter that, in any view of the matter, the impugned order of the learned Magistrate dated 19th

December, 2000, is illegal and bad in law. He has submitted that the learned Magistrate has erred in holding that the complaint is against the firm and all the partners of the firm and therefore if any of the accused intends to take benefits of the settled legal position they should allow to complete the Court proceedings otherwise this application is not liable to be granted.

7.1 Learned counsel for the petitioner has relied upon judgment in the case of Sham Sundar and others Vs. State of Haryana reported in AIR 1989 SC 1982. In para 9 after considering Sec.10 of the Haryana Rice Procurement (Levy) Order 1979 the Hon'ble Supreme Court has observed as under:

> "It is, therefore, necessary to add an emphatic note of caution in this regard. More often it is common that some of the partners of a firm may not even be knowing of what is going on day to day in the firm. There may be partners, better known as sleeping partners who are not required to take part in the business of the firm. There may be ladies and minors who were admitted for the benefit of partnership. They may not know anything about the business of the firm. It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub-section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof, no partner could be convicted. We, therefore, reject the contention urged by counsel for the State."

7.1(A) He has also relied upon the judgment of the Hon'ble Supreme Court in the case of State of Haryana Vs. Brij Lal Mittal and others reported in 1998(4) Supreme Today 364. After referring to Sec.34 of the Drugs and Cosmetics Act, 1940, though section is pari materia of Sec.141 of the Act the Hon'ble Apex Court on page 369 observed as under:

"It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in-charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfills both the above requirements so as to make him liable. Conversely, without being a director a person can be in-charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a bald statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in-charge of the company and also responsible to the company for the conduct of its business."

7.2 He has also relied upon the judgment of the Hon'ble Supreme Court in the case of K.P.G Nair Vs. M/s. Jindal Menthol India Ltd reported in 2000(6) Scale 578. In para 7 the Hon'ble Supreme Court has held as under:

"From a perusal of the excerpts complaint it is seen that nowhere it is stated that on the date when the offence is alleged to have been committed, the appellant was incharge of or was responsible to the accused company for the conduct of its business."

Thereafter in para 8 the Hon'ble Apex Court observed as under:

"From a perusal of Section 141 it is evident that in a case where a company committed offence under Section 138 then not only the company but also every person who at the time when the offence was committed, was incharge of and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the offence and liable to be proceeded against and punished accordingly. It follows that a person other than the company can be proceeded against under those provisions only if that person was incharge of and was responsible to the company for the conduct of its business."

7.3 He has also relied upon the judgment in the case of Mafatlal Swarupchand Thakkar Vs. State of Gujarat reported in 2000(1) GLH (U.J.) 2. In that case, from the facts it appears that the complainant was doing the money

lending business and only allegation against accused No.2 that he was accompanied with the accused No.1 and there was no allegation against accused No.2. In that case after quoting Sec.138 in para 8 the Court has held as under:

"Section 138 of the Negotiable Instruments Act therefore has taken due care to fasten criminal liability on a party, who squarely fall within the first phrase, i.e. first opening part of Section 138. Under Section 138 only that person can be prosecuted who has drawn cheque on an account maintained by him with the banker for the payment. If this test is applied in the present case it clearly appears that the accused No.2 i.e. present petitioner is not a person, who has drawn a cheque on an account maintained by him with the banker. No liability, therefore, would arise so far the present petitioner, i.e. accused No.2 is concerned. Section 138 of the Negotiable Instruments Act as aforesaid has been enacted for special purposes and therefore it must be strictly interpreted and strictly applied. There is no scope of application of Section 114 of the IPC in prosecution taken in Section 138 of the Negotiable Instruments Act. This is so because for the special purpose as aforesaid a criminal liability is fastened by this piece of Legislation to an exclusively civil transactions and therefore the same is required to be interpreted and applied strictly. So far as accused No.1 is concerned, he might be squarely falling within the mischief of Section 138 of the Negotiable Instruments Act because he has signed the cheque and he maintains the account at Bank for which the cheque is drawn. It is immaterial that who wrote in the body of cheque, and for that the accused No.2, cannot be made responsible under Section 138 of the Negotiable Instruments Act. Likewise, merely accompanying with the Accused No.1 to the complainant or even requesting the complainant for the advances of money, would not render accused No.2 liable for prosecution under Section 138, which only recognises the person who has drawn the cheque, and person who has drawn the cheque is a person who has signed the cheque and who is maintaining account in his name with the banker. In these circumstances, the accused No.2 under Section 138 of the Negotiable Instruments Act is improperly involved in this prosecution."

7.3(A) The learned counsel for the petitioner has also relied upon Unreported Judgment of this Court in Criminal Misc. Application No.3748 of 1996 decided by this Court (Coram: S.D.Pandit, J.) on 18th October, 1996. This matter was also arose out of the Negotiable Instruments Act. In that case complaint was filed against the Company and other accused on the ground that other accused were the manager of the company, chairman and managing director of the company and other directors of the company. On page 3 of the said judgment, the Court has observed as under:

> "It is very pertinent to note that the complainant has no where alleged in his complaint that the accused no.7-the petitioner before me is in actual management of the business of the accused no.1 company. It is not the claim of the complainant that petitioner-accused no.7 was conducting the business of the company. When the complainant does not allege in his complaint that the accused-petitioner was responsible to the company for the conduct of the business or that he was incharge of the business of the company or that he was looking after the day to day affairs of the company, merely because the accused petitioner being the director of the company the complainant would not be justified in naming him as an accused in the case."

Thereafter, after considering the judgment of the Hon'ble Apex Court in the case of Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi & Ors. reported in AIR SC 1983 page 67, on Page 4 and 5 the learned Single Judge has held as under:

> "In the present case, there is not a single averments made by the complainant respondent no.1 in the complaint to hold that in view of the said averments the petitioner-accused will have to go before the Trial Court. Merely because the petitioner-accused happens to be the director, even taking into consideration of the provisions of section 141 of the said Act, the prosecution launched against the petitioner-accused will have to be quashed. The view taken by me is also taken by this Court (B.C.Patel,J.) in the earlier decision in Cri. Misc. Appln. No.601/91 to 603/91 and 606/91 and 705/91 and 706/91 on 27.12.93. Thus I hold that in view of the averments made in the complaint itself, the order of issue of process against the petitioner-original accused no.7 is not justified

and therefore, the petitions will have to be allowed and the order of issue of process against the petitioner in cri.case nos.244/91 to 247/91 and 285/91, 316/91 and 317/91 will have to be quashed."

7.4 Learned counsel for the petitioner has similarly relied upon the judgment of the Andhra Pradesh High Court in the case of B.Lakshmi Vs. M/s.Trishul Coal Services & Transporters and others reported in 1997 Cri.L.J. 3616 and in the case of Secunderabad Health Care Ltd. & Others Vs. Secunderabad Hospitals Pvt.Ltd. & Others reported in 1998(4) Crimes 74. Similarly, he has relied upon the judgment of the Allahbad High Court in the case of Smt.Sharda Agarwal and others Vs. Additional Chief Metropolitan Magistrate II, Kanpur and another reported in 1992 Cri.L.J. 1442. He has also relied upon the judgment of the Bombay High Court in the case of Rajan Kinnerkar Vs. Eric Cordeiro and Another reported in 1994(2) Crimes 259 and also the judgment of Delhi High Court in the case of Mahendra Pratap Singh Ratra and another Vs. M/s. N.K.Metals and another reported in 1998 Cri.L.J. 4383.

7.5 Relying upon the aforesaid judgments, he submitted that accused No.2 was not in charge of the firm and was not responsible to the firm for the conduct of his business and, therefore, in any view of the matter he should be discharge at this stage.

8. I have considered the provisions of Sec.138 and Sec.141 of the Act and also the relevant provisions of Partnerships Act which has been relied upon by the learned APP in this behalf. I have already set out the facts in this case in which applicant-original accused is a partner in the firm which has carried out on business with the complainant in fact total business of sale and purchase between complainant and accused to the extent Rs.16,88,153/- and about Rs.10,95,000/- has been paid and only about Rs.6 lacs were to be paid by the accused. The complainant has averred in his complaint that accused No.1 and 2 were the partners of M/s. Bhagyoday Industries, partnership firm which is of accused No.3 and this business was carried out since 1995 and both the accused have jointly carried out business as a partners in the said firm. In fact when the account was opened, both the accused No.1 and 2 went to complainant in connection with sale and purchase of the business. The cheques have been drawn by accused No.1 in his capacity as a partner of the partnership firm and accused No.2 has assured the complainant that as and when the cheques were

presented in the Bank the same may be honoured in due course. In view of this facts and circumstances of the case, the provisions of Sec.138 and Sec.141 of the Act are clearly applicable to this case. In my view, in this case when accused No.2 applicant herein is a partner of the firm and when he has actually actively take part in carrying on business as a partner of partnership firm is concerned, the accused No.2 is responsible to the firm for the carrying on the business of the firm and during relevant time he was in charge of the business of the firm. He shall be deemed to be guilty of the offence and shall be liable to be punished for the offence accordingly. There is clear and specific allegation against accused No.2 that the business has been carried out with his knowledge and he was responsible to the firm in connection with carrying on business. In my view, the offence have been committed with consent or connivance of accused No.2 applicant herein and commission of offence can also be attributable to the conduct of the accused No.2. The provisions of the Negotiable Instruments Act clearly applies to this case and provisions of the Partnership Act also support my conclusion. All other cases which have been relied upon by the petitioner are cases of firm or companies of in relation to partners or directors where there are some partners/directors who are actually associated with the carrying on business whereas there are some partners/directors who are partners/directors who are actually not concern with the day to day working of the company but they enjoyed certain position or social status, and they become directors and in that context the Hon'ble Supreme Court and the other judgments of High Courts have held that such directors/partners are not responsible for carrying on business of the company/firm and to that extent they may be discharged. The judgment of the Hon'ble Apex Court are binding on me, however these principles are not applicable to the facts and circumstances of the case. The case of respondent No.2 is not that he is sleeping partner or he is not required to take part in the day to day business of the firm. In this case offence has taken place within knowledge of the accused No.2 and he has not exercised due diligence to prevent such offence may not take place.

In view of the same, the Criminal Revision Application is dismissed. The order dtd.19.12.2000 of the learned Judicial Magistrate, First Class, Mansa, dismissing the discharge application is legal and valid and the same is upheld. Rule is discharged. The stay granted earlier by this Court shall stand vacated.

(K.M. Mehta, J.)

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